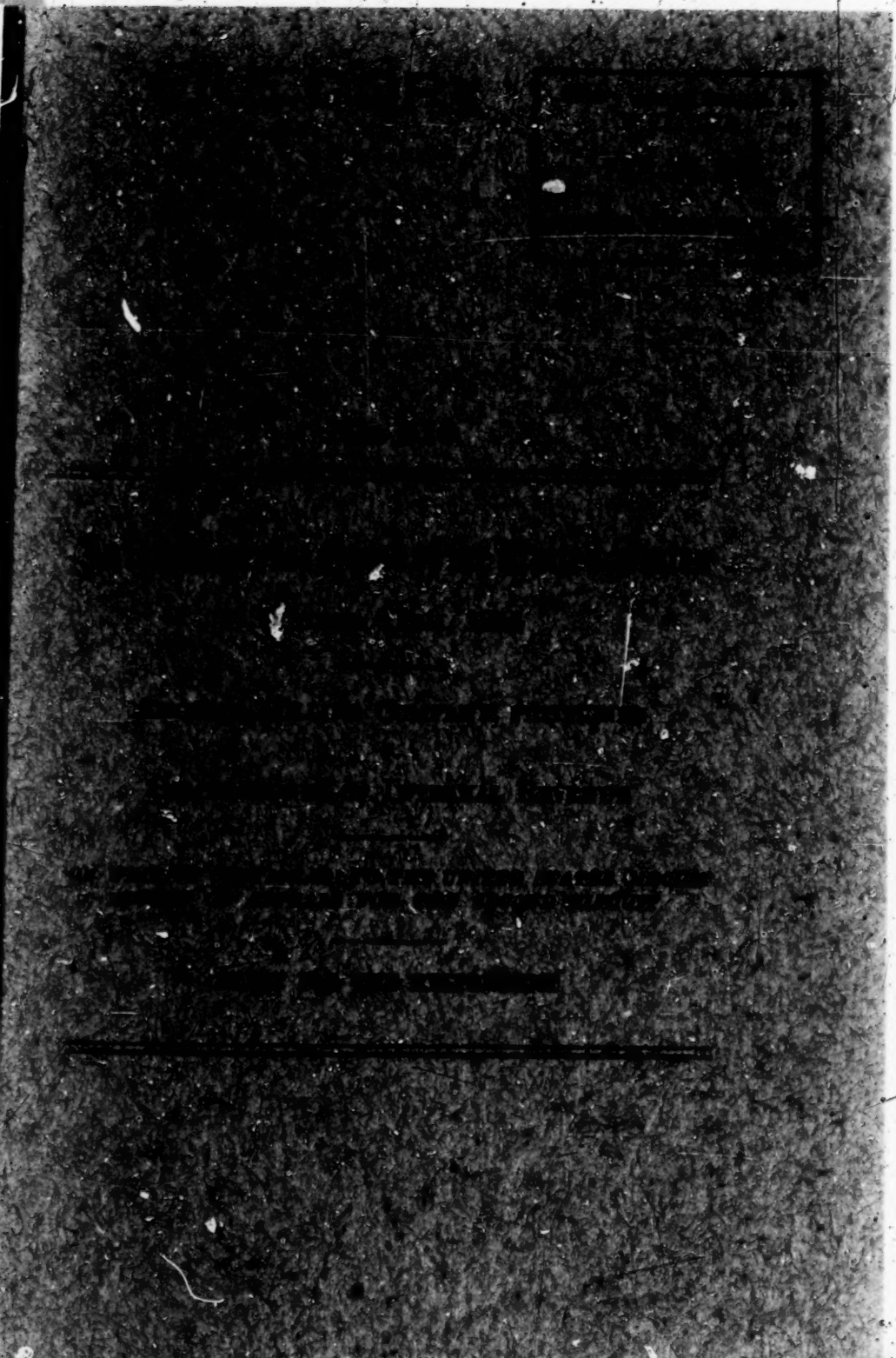

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of The Tax Court of the United States (R. 91–97) is reported at 1 T. C. 1031. The opinion of the Circuit Court of Appeals (R. 133–139) is reported at 144 F. 2d 469.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming that of the Tax Court, was entered on July 24, 1944. (R. 139.) The case was decided and the opinion of the court was filed on July 6, 1944. (R. 133.) The petition for a writ of certiorari was filed October 18, 1944, and was

granted on December 4, 1944.[1] (R. 140.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner does not contend that a proper claim for refund of processing taxes is not a prerequisite to the Tax Court's jurisdiction. Therefore the questions presented are:

1. Whether the petitioner's claim "clearly set forth under oath all evidence relied upon in support" of the claim as required by Section 903 of the Revenue Act of 1936, as amended, and whether it conformed to the applicable Treasury Regulations as required by Section 902.

2. Whether any defects in the claim were waived by the Commissioner of Internal Revenue.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 40–52.

STATEMENT

This proceeding involves a claim for refund of $145,839.12, alleged to have been paid as processing tax under the Agricultural Adjustment Act,

[1] The same question of whether the petition for certiorari was filed in time arises in this case as in *Commissioner* v. *Estate of Edward T. Bedford*, No. 710, October Term, 1944, where the Government contends that the petition was filed within time under similar circumstances.

c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat. (R. 91.) The proceeding was first instituted before the Processing Tax Board of Review by a petition filed on August 20, 1941 (R. 7–41), to review the Commissioner's disallowance of the petitioner's claim for refund of that amount.[2] An amendment to the original petition was filed with the Board of Review on November 21, 1941 (R. 49–53), and on December 29, 1941, an amended petition was filed with the Board (R. 63–70). The Commissioner of Internal Revenue thereupon moved to dismiss the proceeding on jurisdictional grounds. (R. 72–76, 78–79.) The Commissioner's motion was denied by an order entered August 5, 1942, one member dissenting, and the Commissioner was granted leave to file an answer. (R. 80–81.)

The Commissioner's answer was filed with the Board of Review on August 21, 1942, and in his answer he alleged as an affirmative defense the jurisdictional grounds upon which his motion to dismiss had been based. (R. 82–85.)

After the Board of Review was abolished, this proceeding was transferred to The Tax Court of the United States and on January 29, 1943, the Commissioner filed with the Tax Court a new

[2] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its jurisdiction and functions were transferred to the Board of Tax Appeals, the name of which was changed to The Tax Court of the United States by Section 504 (a) of the Revenue Act of 1942.

motion to dismiss on jurisdictional grounds. (R. 86–90.) The first ground of this motion to dismiss was, in substance, that the so-called "Amendment to Claim" attached as Exhibit "C" (R. 30–39) to the original petition filed with the Board of Review, which constituted the purported claim on which the action was based, was insufficient in law to constitute a basis for such action (R. 86–89). The second ground of the motion to dismiss was that there were no evidentiary facts submitted in connection with the so-called claim from which the Commissioner could legally have determined that the petitioner either paid any amount as processing tax or that it bore the burden of any amount so paid. (R. 90.)

In an opinion promulgated May 4, 1943 (R. 91–97), the Tax Court held that it had no jurisdiction, since the several claims for refund of processing taxes upon which petitioner relied failed to set forth any of the information called for by the law, the regulations, and Form P. T. 79, and that such defects had not been waived by the Commissioner of Internal Revenue. An order of dismissal was entered. (R. 98.) The Circuit Court of Appeals affirmed the order of the Tax Court. (R. 139.)

The record discloses that the Commissioner on May 23, 1941, rejected the petitioner's claim on the ground that it had not paid any amount to the Government as processing tax and on the further ground that the petitioner had not filed

a valid and complete refund claim containing margins or other evidence establishing that petitioner bore the burden of the tax as required by Title VII of the Revenue Act of 1936 and the Treasury Regulations promulgated thereunder. (R. 40–41.) In appealing to the Board of Review, the petitioner alleged in its original petition that during the period of July 9, 1933, to January 6, 1936, inclusive, it was "a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company;" that during this period it "paid, or had paid for its account out of its own monies" processing taxes in the sum of $145,839.12. Then followed the allegation that on or about January 29, 1936, claims were filed on Form 843 by "Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.,"[3] for the refund of processing taxes in the total sum of $454,045.27.[4] Alleged copies of these claims, Exhibits A–1, A–2, and A–3 (R. 11–19), were attached to the original petition filed with the Board (R. 7). The claims were filed on or about June 22, 1936.[5] (R. 93.) They

[3] Apparently the name of Middleport Flour Mills, Inc., was changed to Angelus Milling Company. (R. 49, 63, 69.)

[4] Similar allegations are made in the amended petition filed with the Board. (R. 65–67.) The figure $454,045.27 is in error. The correct figure is $434,045.27, the aggregate of the amounts stated on the face of the three claims.

[5] The Revenue Act of 1936 which alone authorized the filing of claims for the refund of processing taxes paid was approved by the President at 9:00 P. M., June 22, 1936.

were on Form 843 rather than on Form P. T. 79 which is required by Article 601 of Treasury Regulations 96 (Appendix, *infra*). (R. 11, 14, 17.)

In its original petition (R. 7–8), and in its amended petition (R. 65), the petitioner alleges that on June 30, 1937, after enactment of the Revenue Act of 1936, Niagara Falls Milling Company, Inc., filed a claim for refund of processing tax in the sum of $436,231.73 "paid on account of the processing of wheat by it and by Petitioner" (R. 65). An alleged copy of this claim, Exhibit "B" (R. 20–29), was attached to the original petition filed with the Board. The claim shows on its face that processing taxes of $436,231.73 were paid by Niagara Falls Milling Company, Inc. (R. 24–25, 27.)

In its original petition (R. 8) and in its amended petition (R. 65), the petitioner alleges that on or about August 15, 1938, it filed a claim for refund of $145,839.12 "paid out of its monies" on account of the processing of wheat by it, designating this claim as "Amendment to Claim". A copy of this so-called "Amendment to Claim" (Exhibit "C", R. 30–39), was attached to the original petition filed with the Board.

This claim contained a schedule (R. 32) purporting to show the total number of barrels of flour produced by Niagara Falls Milling Company and Middleport Flour Mills, Inc. (now Angelus Milling Company, Inc.), the gross sales value

thereof, a total processing tax computed thereon of $434,045.27, and an allocation attributing $145,839.12 of this amount to flour produced by the petitioner. In addition, the following sworn statement of allocation of liability was attached to the claim (R. 33):*

> The within claim for refund was originally filed on the 22d day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills, Inc. was changed by permission of the Secretary of State at Albany, N. Y. to Middleport Flour Mills Inc. [sic.]. Originally the claim in the name of both Companies was for the sum of $434,045.27.
>
> The amount to be allocated to the Angelus Milling Company is $145,839.12 and the amount to be allocated to the Niagara Falls Milling Company is $288,206.15.
>
> Since the filing of said claim, the Niagara Falls Milling Company was adjudicated a bankrupt on the 21st day of March, 1938. Since said date the claim of the Niagara Falls Milling Company, Inc. and the Angelus Milling Company, Inc. was handled by the same personnel, both companies having had the same officers and approximately the same directors. The Angelus Milling Company, Inc. at the present time

* A different allocation of this liability is set out in allegations contained in the amendment to its original petition which the petitioner filed on November 21, 1941 (R. 49–53), and in its amended petition (R. 64–65).

> is not bankrupt and this amended claim is presented solely on behalf of the Angelus Milling Company, Inc. and request is hereby made that the amount of refund due the Angelus Milling Company, Inc. be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company. The within claim has been prepared from certain records of the two companies and is based on data as shown by the attached Schedule A.

In addition to the foregoing allegations, the petitioner alleges in its amended petition (R. 63–67) that for the period July 9, 1933, to January 31, 1935, inclusive, joint returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company, Inc., were filed with the Collector and tax in the sum of $324,616.25 was paid on account of such processing, and that for the period February 1, 1935, to November 30, 1935, inclusive, returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company were filed in the name of Niagara Falls Milling Company and tax in the sum of $110,029.02 was paid on account of such processing (R. 63–64).

After the original petition was filed with the Board of Review, the Commissioner filed a motion for better statement of claim with reference to the allegations of the petition (R. 42–46.) That motion was denied and the petitioner was

granted leave (R. 71) to file an amended petition (R. 63–70). At a hearing certain documents were offered in evidence, the substance of which is incorporated in the "Statement of Evidence". (R. 109–129.) The statement of evidence and the attached documents show that a "Monthly Return of Processor of Wheat, P. T., Form 1," was filed for each of the months from July, 1933, through January, 1935, by "Niagara Falls Milling Co. and Angelus Milling Company, Inc., * * * on account of processings of wheat * * * in the mill at *Lockport,* New York" (R. 119); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," for each of the months from February, 1935, through November, 1935, "on account of processings of wheat * * * in the mill at *Lockport,* New York" (R. 110–111); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," on account of wheat processed "in the mill at *Middleport,* New York," for each of the months from February, 1935, through November, 1935 (R. 111); and that a letter (R. 125) was sent to Harry Dickson, president of both corporations by the General Deputy Collector at Buffalo, New York, requesting permission to examine the general ledgers of the Angelus and Middleport corporations for the years 1935 and 1936 (*id.*). The affidavits of two certified public accountants

were also offered in evidence. (R. 111–112, 126–129.)

The Tax Court held that the claims for refund did not meet the requirements of the statute and applicable Treasury Regulations promulgated pursuant thereto. (R. 95–96.) It also held (R. 95–97) that the Commissioner had not waived any defects in the claims as filed. It therefore dismissed the proceedings for lack of jurisdiction. (R. 98.) The Circuit Court of Appeals affirmed. (R. 133–139.)

SUMMARY OF ARGUMENT

This action was brought under Title VII of the Revenue Act of 1936 for the refund of amounts alleged to have been paid as processing tax under the Agricultural Adjustment Act, the taxing provisions of which had been held to be unconstitutional. The remedy provided by Title VII for the recovery of such taxes is exclusive. As a condition of the allowance of a refund of such taxes a claimant is required by the statute to file a claim for refund in accordance with provisions of the statute and regulations prescribed thereunder by the Commissioner of Internal Revenue, stating the grounds of the claim, and supported by all the evidence, under oath, relied upon to show that it bore the burden of the tax and did not shift it to others. The claimant is further required to submit evidence of average margins, as defined in the statute, for the tax period and the statutory

base period. The statute creates a presumption, based upon a comparison of the margins, as to the extent to which the burden of the tax was borne by the claimant. Regulations promulgated pursuant to authority granted by the statute prescribe the form on which a claim for refund must be made and specify the nature of the evidence which must be submitted as a part of the claim for refund.

An action for recovery of taxes erroneously or illegally collected can be maintained against the Government only upon strict compliance with the statutory conditions under which the Government consents to be sued. Compliance with such conditions is jurisdictional. In this case the so-called claim for refund upon which the action is based does not satisfy the requirements of the applicable provisions of the Revenue Act of 1936 and the regulations promulgated thereunder, since neither the original claim, filed jointly by petitioner and Niagara Falls Milling Co. (Exhibits A–1, A–2 and A–3, R. 11–19), nor the "Amendment to Claim" (Exhibit "C," R. 30–39) show that petitioner paid any tax or contain the evidence relied upon to sustain a recovery, but merely allocate to the petitioner an amount of refund said to be due to it for taxes paid by the Niagara Falls Milling Co. Petitioner's attempt to separate its claim from that of the Niagara Falls Milling Co. (R. 33) precludes resort to that company's separate claim (R. 20–29) for supporting data, the applicability of which

could not in any case be determined from the claims.

The Commissioner of Internal Revenue may not waive any failure to comply with statutory requirements for the maintenance of an action against the Government for refund of taxes. In the instant case the Tax Court has found that the requirements were not in fact waived. That is essentially a question for final determination by the Tax Court. There is nothing in the record to demonstrate that the Commissioner did or could make a determination upon petitioner's claim from the data available to him.

The Tax Court was without jurisdiction for the further reason that the claim does not show the petitioner paid any amount to the Government as tax under the Agricultural Adjustment Act. Such a failure of proof is fatal to any claim.

ARGUMENT

I

TITLE VII OF THE REVENUE ACT OF 1936 PROVIDES THE EXCLUSIVE REMEDY FOR RECOVERY OF AMOUNTS PAID AS TAX UNDER THE AGRICULTURAL ADJUSTMENT ACT

The proceeding is to recover amounts alleged to have been paid by or on behalf of the petitioner as processing tax imposed under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat. The taxing provisions of that Act were held unconstitutional in *United States* v. *Butler*, 297 U. S. 1,

and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110.[7] Thereafter Congress enacted the Revenue Act of 1936, Title VII of which (comprising Sections 901 to 917, inclusive) authorizes the refund, subject to certain conditions and limitations, of amounts paid as tax under the Agricultural Adjustment Act.[8]

The remedy provided by Title VII of the 1936 Act for the recovery of taxes paid under the Agricultural Adjustment Act is exclusive. Section 902 of Title VII (Appendix, *infra*) provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner, "in accordance with regulations prescribed by him", or to the satisfac-

[7] That case held that amendments to the taxing provisions of the Act made by the Act of August 24, 1935, c. 641, 49 Stat. 750, did not cure its defects.

[8] Section 9 of the Agricultural Adjustment Act, as amended, authorized the imposition of a processing tax upon the first domestic processing of the basic agricultural commodities designated in Section 11, as amended, and Section 15 (d) authorized the imposition of a similar tax upon the first domestic processing of competing commodities; Section 16 of the Act, as amended, authorized the simultaneous imposition of a so-called floor stocks tax upon articles processed wholly or in chief value from a basic or competing commodity and held for sale or other disposition; Section 15 (e) of the Act, as amended, authorized the imposition of a compensating tax upon the importation of articles manufactured wholly or partly from such a commodity. The refund of all such taxes is governed by the applicable provisions of Title VII of the Revenue Act of 1936.

tion of the trial court or, in the case of processing taxes, of the Board of Review, that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, in any manner whatsoever.[9]

Section 903 of Title VII, as amended (Appendix, *infra*), provides that no such refund shall be made or allowed unless, "after the enactment of this Act, and prior to July 1, 1937,[10] a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary". The section further provides that "All evidence relied upon in support of such claim shall be clearly set forth under oath". The Commissioner was also authorized to prescribe by regulation the number of claims which may be filed by any claimant with respect to the total amount paid as tax under the Agricultural Adjustment Act and to require that claims for refund of amounts paid with respect to any commodity or group of commodities should cover the entire period for which such taxes were paid. In addition to this provision, Section 916 of Title VII authorized the Commissioner, with the approval of the Secretary, to "prescribe such

[9] This section refers to the burden of the tax in the broad economic sense of the term. *Cudahy Packing Co. v. United States*, 126 F. 2d 429 (C. C. A. 7th).

[10] The time for filing such claims was extended by Section 405 of the Revenue Act of 1939, c. 247, 53 Stat. 862, to January 1, 1940.

rules and regulations as may be deemed necessary to carry out the provisions of this title".

The district courts and the Court of Claims were given concurrent jurisdiction of suits for refund of amounts paid as floor stocks tax, and compensating tax,[11] and the Processing Tax Board of Review was created by Section 906 of the 1936 Act and given exclusive jurisdiction to review the Commissioner's allowance or disallowance of claims for refund of amounts paid as processing tax under the Agricultural Adjustment Act. The Circuit Courts of Appeals were given jurisdiction to review decisions of the Board of Review, with further review by the Supreme Court on certificate or certiorari.[12]

Section 907 of the 1936 Act (Appendix, *infra*) provides that where the refund claimed is for an amount paid as processing tax under the Agricultural Adjustment Act it shall be *prima facie* evidence that the burden of such amount was borne by the claimant to the extent that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. But if the average margin was not lower during the tax period it is *prima facie* evidence

[11] See Section 905 of the 1936 Act. Section 910 of the Act prohibited such suits against collectors of internal revenue.

[12] See Section 906 (g) of the 1936 Act, amended by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

that none of the burden of the processing tax was borne by the claimant but that it was shifted to others. The section then defines the terms "tax period" and "period before and after the tax" as there used and prescribes the manner in which the "margins" for each period shall be computed. Subsection (e) of Section 907 then provides that either the claimant or the Commissioner "may rebut the presumption established by subsection (a) * * * by proof of the actual extent to which the claimant shifted to others the burden of the processing tax", and specifies certain matters which shall be considered as evidence of the actual extent to which the tax burden was borne or shifted by the Claimant. *Webre Steib Co., Ltd.* v. *Commissioner,* No. 148, decided February 12, 1945.

Pursuant to the provisions of the 1936 Act the Commissioner promulgated Treasury Regulations 96, relating to claims for refund under Title VII of the Act. Article 201 of Treasury Regulations 96 (Appendix, *infra*) provides that claims for refund under Title VII "shall be made on the prescribed forms", and that they "shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations". Article 202 (Appendix, *infra*) provides:

> Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the

> claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

A separate form was prescribed by the regulations for use in preparing a claim for refund of each type of tax subject to the provisions of Title VII of the 1936 Act. Article 601 of Treasury Regulations 96 (Appendix, *infra*) requires that claims for refund of amounts paid as processing tax be prepared on P. T. Form 79. Article 602 provides that a separate claim shall be filed with respect to each commodity on the processing of which a processing tax was paid, and that only one claim shall be filed by any person with respect to the total amount paid as processing tax on the processing of a single commodity. Article 603 (Appendix, *infra*) provides that the claimant "shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity", and each claim is required to show the total tax liability returned, the total amount paid, the

date and amount of each payment and month for which paid, the portion which represents tax on custom processing, the portion which represents processing tax as defined in Section 913 (b) of the 1936 Act, and the Collector to whom paid.[13]

Article 605 of Treasury Regulations 96 (Appendix, *infra*), relating to the *prima facie* determination required by Section 907 of the Act, provides that "There shall be submitted with, and as part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax". The article then outlines the method of computing the margins required by the statute for determining the *prima facie* extent to which the tax burden was borne by the claimant.[14] Article 606 (Appendix, *infra*) provides that the claimant may submit with the claim any other available information tending to establish that it bore the burden of the tax.[15]

These provisions indicate the complexity of the problem and the elaborate plans made by the Government to deal with it. The Commissioner was fully justified in requiring that the necessary information be supplied in a uniform manner

[13] An appropriate schedule for listing this information was made a part of the prescribed refund claim P. T. Form 79 (R. 31.)

[14] Appropriate schedules for listing this information and making the necessary marginal comparisons are made a part of the prescried P. T. Form 79. (R. 35–37.)

[15] An appropriate space is provided in P. T. Form 79 for incorporating such evidence. (R. 37.)

and with sufficient completeness to permit it to be promptly handled and verified. This Court has held that similar reasons justified the Commissioner in requiring a separate return for a special class of income. *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 223. The method of claiming processing tax refunds under the Revenue Act of 1936, thus validly prescribed, is obviously the exclusive method, with which claimants must comply.

II

THE PETITIONER FAILED TO COMPLY WITH THE CONDITIONS PRECEDENT TO THE MAINTENANCE OF THIS ACTION

Since there was a failure to satisfy the valid requirements of the statute and regulations, and the failure involved a matter which is a prerequisite to suit, the Tax Court was without jurisdiction.

This was one of the grounds of the Commissioner's rejection of the claim for refund (R. 40–41); it was urged in support of the motion to dismiss (R. 86–90); and it was the ground on which the Tax Court dismissed the proceeding (R. 91–98) and the Circuit Court of Appeals affirmed (R. 138–139). We submit that the decision of the courts below on this question was correct.

It is elementary that the sovereign is not suable of right. *United States* v. *Clarke*, 8 Pet. 436,

443–444; *Lynch* v. *United States*, 292 U. S. 571, 580; *Dismuke* v. *United States*, 297 U. S. 167, 171–172. As a corollary it is well settled that suits for the recovery of taxes illegally collected may be maintained against the Government only under such conditions and subject to such limitations as the Congress shall prescribe, and those conditions must be complied with strictly. *Collector* v. *Hubbard*, 12 Wall. 1; *Cheatham* v. *United States*, 92 U. S. 85; *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141; *United States* v. *Michel*, 282 U. S. 656; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; *Anniston Mfg. Co.*, v. *Davis*, 301 U. S. 337. The rule is strictly applied and this Court has said that an action "may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, *supra*, p. 659. "If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with." *Rock Island &c. R. R.* v. *United States*, *supra*, p. 143. Cf. *Collector* v. *Hubbard*, *supra*.

It has been uniformly held that compliance with the conditions upon which the Government has consented to be sued is jurisdictional. See *United States* v. *Chicago Golf Club*, 84 F. 2d 914 (C. C. A. 7th); *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645; *Alexander Smith & Sons C. Co.* v. *Commissioner*, 117 F. 2d 974 (C. C. A. 2d).

The petitioner is proceeding under the provisions of Title VII of the Revenue Act of 1936, the material portions of which, together with the material portions of Treasury Regulations 96 prescribed thereunder, are reviewed above. It is clear from these provisions that a condition precedent to the maintenance of an action against the Government for recovery of an amount paid as processing tax under the Agricultural Adjustment Act is the filing of a timely claim, after enactment of the 1936 Act and prior to the expiration of the time fixed by Section 903, as amended, and that it must contain the data called for by the statute and the Regulations, including the margin data required by Section 907 of the Act for determining the *prima facie* extent to which the claimant bore the burden of the tax and any other data available to him which would tend to show the "actual extent" to which he bore the burden of the processing tax if the margin computations under Section 907 of the Act are unfavorable to him.

In this case the only condition prescribed by Title VII and the Treasury Regulations with which the petitioner complied was the timely filing of an official P. T. Form 79, designated "Amendment to Claim" (Exhibit "C", R. 30–39), in which it demanded a refund of $145,839.12. It gave none of the data required by the statute, the regulations, or the several schedules which were a part

of the official form. None of the schedules provided on the form for furnishing the information required by the statute and the Regulations were filled in. (R. 30–39.) The only information furnished, other than the name and address of the claimant and the amount of refund claimed, was a schedule purporting to be an allocation between the petitioner and Niagara Falls Milling Company of the total amount of processing taxes paid by Niagara[16] to the Collector of Internal Revenue (R. 32), and a statement (R. 33) which furnishes none of the data required by the statute and the regulations. The figures shown in this purported allocation (R. 32) do not correspond to the amounts alleged in the amendment to the original petition (R. 51–52) and in the amended petition (R. 64–65), as having been paid on account of the processing done by the petitioner. Petitioner's claim says (R. 33) the claim originally was filed June 22, 1936, "in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc.," for the sum of $434,045.27.[17] This is the aggregate amount of the claims (Exhibits A–1, A–2, A–3, R. 11–19) filed on Form 843. The original petition and the amended petition both allege these claims were filed on or about January 29,

[16] The Tax Court found (R. 97), "The claims state that the tax was paid by Niagara."

[17] It should be noted that the petitioner (Br. 10) misstates this figure as being $454,045.27.

1936.[18] (R. 7–8, 65.) The only information furnished in the original claims on Form 843 (R. 11–19) is the name and address of the joint claimants, and a statement of the dates and amounts of the payments made to the Collector by Niagara Falls Milling Company.

Clearly the "Amendment to Claim" (Exhibit "C", R. 30–39) is not a sufficient claim under the statute and regulations to constitute a basis for suit against the Government, and we do not understand the petitioner to contend otherwise. It is no more a claim for refund which satisfied the requirements of the statute and the regulations than were the documents filed as claims in *Jaubert Bros.* v. *United States,* 141 F. 2d 206 (C. C. A. 5th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452 (C. C. A. 6th); *Landrum* v. *Commissioner,* 122 F. 2d 857 (C. C. A. 8th); and *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th). In all of these cases, as in the instant case, the Commissioner moved to dismiss the proceeding for lack of jurisdiction on the ground that the purported claim for refund did not sufficiently comply with the requirements of the statute and

[18] The Tax Court found they were filed on or about June 22, 1936. (R. 93.) The Revenue Act of 1936 became a law at 9:00 P. M., June 22, 1936. This is the reason why the claims (Exhibits A–1, A–2, and A–3, R. 11, 14, 17) were filed on Form 843.

regulations to constitute a basis for an action against the Government. In each case this contention was sustained, the court holding there was no error in dismissing the proceeding for lack of jurisdiction.

There is an abundance of support for dismissal of the petition on account of the insufficiency of the statements in the claims filed under Title VII of the 1936 Act. See *New York Handkerchief Mfg. Co.* v. *United States,* 142 F. 2d 111 (C. C. A. 7th), certiorari denied October 9, 1944; *18th Street Leader Stores* v. *United States,* 142 F. 2d 113 (C. C. A. 7th), certiorari denied October 9, 1944; *Samara* v. *United States,* 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Weiss* v. *United States,* 135 F. 2d 889 (C. C. A. 7th); *Jaubert Bros.* v. *United States,* 141 F. 2d 206 (C. C. A. 5th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th); and *Caldwell Sugars* v. *United States,* 54 F. Supp. 544, 552 (C. Cls.)

Since petitioner's "Amendment to Claim" (Exhibit "C", R. 30-39) is not of itself sufficient to constitute a basis for this action, it is necessary to determine whether it is sufficient as an amendment to a prior claim timely filed.

Petitioner does not argue that its "Amendment to Claim" complies with the requirements of the statute and the regulations. It does not in its brief take a definite position as to whether

the "Amendment to Claim" filed by it on P. T. Form 79 is an amendment to the joint claims filed on Form 843 or is an amendment to the separate claim (Exhibit "B", R. 20–29) filed on P. T. Form 79 by Niagara Falls Milling Company. The basis of its argument is that if all the claims for refund filed by petitioner and Niagara be considered together, petitioner's claim is not defective. The theme reiterated throughout the brief is that the claims considered together gave all of the basic data and that, since the Commissioner is said to have known of the interrelationship of the companies, any defects were waived. The entire argument is in generalities and much of it is not supported by the record. Especially is there no support for the repeated and emphatic assertions that the Commissioner had all of the data necessary to pass upon the petitioner's claim on its merits.

If petitioner's "Amendment to Claim" (Exhibit "C", R. 30–39) is to be considered as an amendment to the joint claims filed on Form 843 (Exhibits A–1, A–2 and A–3, R. 11–19) it obviously is inadequate as a basis for suit against the Government because the earlier claims likewise fail clearly to set forth all supporting evidence relied upon. The Tax Court held that the "Amendment to Claim" filed by the petitioner "must have been intended as an amendment to the claims represented" in Exhibits A–1, A–2 and A–3 (R. 93), which were filed in the joint names

of the companies on Form 843. This conclusion is fully justified by the statement (R. 33) attached to the "Amendment to Claim". The amount of $434,045.27[19] referred to therein is the same as the aggregate amount referred to in the claims filed on Form 843, but is different from the amount of $436,231.73 demanded in the claim filed on P. T. Form 79 by Niagara Falls Milling Company (Exhibit "B", R. 20–29). As the Tax Court pointed out (R. 93), none of the information required by the statute and the regulations was given in the claims represented by Exhibits A–1, A–2, A–3 and Exhibit "C". Exhibits A–1, A–2 and A–3 show only dates of payments of taxes by Niagara Falls Milling Company. (R. 13, 16, 19.) They obviously were inadequate in substance for purposes of Title VII and the deficiency was not supplied by the later so-called "Amendment to Claim" (Exhibit "C") filed by the petitioner.

Petitioner has not alleged or shown that the "Amendment to Claim" filed by it on P. T. Form 79 was an amendment to the separate claim filed on P. T. Form 79 (Exhibit "B", R. 20–29) by Niagara Falls Milling Company. It is not alleged that the claim filed on P. T. Form 79 in the name of Niagara Falls Milling Company (Exhibit "B", R. 20–29) was filed by or on behalf of the peti-

[19] The petitioner (Br. 10) misstates this figure as being $454,045.27.

tioner, and it could not, indeed, be treated as having been filed by Niagara as agent of the petitioner. Cf. *Savannah Sugar R. Corp.* v. *Commissioner*, 121 F. 2d 426 (C. C. A. 5th); *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645. We know of no authority which would permit this petitioner to bring a suit on the claim filed by Niagara Falls Milling Company, a separate taxpayer, and we know of no authority which would permit the petitioner to treat the claim filed by Niagara as its own claim for purposes of filing an "Amendment to Claim". The courts have consistently held that a claim for refund under Title VII of the 1936 Act must be filed by the person who was liable for, and who paid, the tax to the Government. See *F. & F. Laboratories* v. *Commissioner*, 104 F. 2d 563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Southwestern Scram Co.* v. *Commissioner*, 108 F. 2d 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Arabi Packing Co.* v. *Commissioner*, *supra*; *Grain Belt Supply Co.* v. *Commissioner*, 109 F. 2d 490 (C. C. A. 8th), certiorari denied, 310 U. S. 648; *Zinsmaster Baking Co.* v. *Commissioner*, 109 F. 2d 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *Fuhrman & Forster Co.* v. *Commissioner*, 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686; *New Consumers*

Bread Co. v. *Commissioner,* 115 F. 2d 162 (C. C. A. 3d); *Alexander Smith & Sons C. Co.* v. *Commissioner,* 117 F. 2d 974 (C. C. A. 2d); *Lindner Packing & P. Co.* v. *Commissioner,* 118 F. 2d 656 (C. C. A. 10th); *Albert Miller & Co.* v. *Commissioner,* 120 F. 2d 789 (C. C. A. 7th); *Savannah Sugar R. Corp.* v. *Commissioner, supra.*

The statement (R. 33) which accompanied Exhibit C specifically requested:

> "that the amount of refund due the Angelus Milling Company, Inc., be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company."

This language specifically disavows any purpose that Exhibit "C" should be treated as an amendment of the Niagara claim, Exhibit "B" (R. 20) and it attempts to divide the joint claim, Exhibit "A" (R. 11–19).

The reason for this belated insistence upon a separation is said to be (R. 33) that Niagara was adjudicated a bankrupt after the Niagara claim, Exhibit "B", was filed. It thus becomes clear that the present controversy had its origin in an attempt by petitioner to separate its claim from that of Niagara. Because of the consolidated books and the informal manner in which the affairs of the two corporations were managed (R. 96) petitioner's present difficulty is in stating a separate case for itself. But the difficulty is of

its own making, for the record indicates (R. 126–127, reprinted at pp. 13–14 of the Appendices to the petition) that the Commissioner did not require separate evidence from petitioner until petitioner insisted on separate treatment. Cf. petitioner's brief, pp. 25, 48.

Plainly the court below drew an unwarranted implication when it criticized the Commissioner (R. 138–139) upon the assumption that he had given the petitioner reason to suppose that he would consider its *separate* claim upon the merits, despite the absence of any records disclosing petitioner's individual transactions.

III

THE DEFECTS OF THE PETITIONER'S CLAIM FOR REFUND WERE NOT WAIVED BY THE COMMISSIONER

The statements, reiterated in varying form throughout petitioner's Statement of Case (Br. 3–15) and brief, that the Commissioner obtained all the data lacking on the face of the claim; that the Commissioner waived any formal defects in petitioner's claim; and that if the claims for refund filed by petitioner and Niagara Milling Company are considered together, petitioner's claim is not defective, are contrary to the findings of the Tax Court (R. 91–97). The contention that the Commissioner examined petitioner's claim on the merits has not been established.

The Commissioner's letter (Exhibit "D", R. 40–41) rejecting the claim filed by the petitioner

assigned as reasons for the rejection that (1) the amount for which refund is claimed was not paid as taxes to the Government by the petitioner; (2) the claim does not contain margins computed as required by law and applicable Treasury Regulations; and (3) the claim fails to furnish any other evidence establishing that petitioner bore the burden of the tax as required by law and applicable Treasury Regulations. The letter also states (R. 40):

> Since you did not pay the tax, refund of which is claimed, to the Government and you have not filed a true and complete claim in accordance with the requirements of Title VII of the Revenue Act of 1936, your claim is hereby disallowed in full.

The Tax Court found (R. 97) that there had been no waiver of defects in the claim by the Commissioner. Its determination is, we submit, final under the principle of *Dobson* v. *Commissioner*, 320 U. S. 489, and *Commissioner* v. *Scottish American Inv. Co.*, Nos. 52–54, this Term, decided December 4, 1944; for it is a conclusion, relating to tax administration, for which there is ample support in the record.

In connection with the contention that the Commissioner waived the defects in the claim, the petitioner relies upon certain affidavits (R. 126–129), reprinted at pp. 13–14, 16 of the Appendices to the petition for certiorari, and a letter (*ibid.* p. 15, R. 125) from a General Deputy Collector request-

ing an examination of certain books of Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc., in connection with the claim for refund F 5899 (Exhibit "B", R. 20) which had been filed by Niagara Milling Company (R. 96). The petitioner's claim for refund was F 10130. (R. 96, Exhibit "D", R. 40–41.) The Tax Court held (R. 96) that the letter did not support the petitioner's contention that the Commissioner gave consideration to the merits of petitioner's claim. The Tax Court also held (R. 96) "The affidavits are not convincing that the Commissioner waived any defects in the claim of this petitioner." and "There is no allegation in the petitioner's pleadings to the effect that the Commissioner waived defects and investigated the claim on its merits. On the contrary, the petition assigns as one of the errors [in the original petition (R. 8) and the amended petition (R. 66)] the action of the Commissioner 'in failing to give consideration to, and the usual hearings on, petitioner's claim'." (R. 97.)

The substance of the affidavits is that Raymond A. O'Connor, a certified public accountant, audited the books of petitioner and of Niagara Falls Milling Company (date not given); that between March 1, 1939, and March 22, 1939,[20] he obtained

[20] On these dates petitioner's claim was out of time (Cf. Pet. Br. 24, 25) and counsel has volunteered the information that the claim was not examined until 1940, after validation in the Revenue Act of June 29, 1939, *supra*, n. 10, p. 14, and after the time for filing claims had expired. Pet. Br., p. 48.

from the trustee in bankruptcy for Niagara "photostatic copies of the working papers of the representatives of the Bureau of Internal Revenue" (nature and contents not given); that the two corporations had common officers, a common bank account, and a common set of books; that in examining the claim for refund filed by Niagara the representatives of the Bureau "also examined the records of the Angelus Milling Co., Inc." (but for what reason is not stated); that he was unable to obtain the books of petitioner until about September, 1941, but did obtain "the essential figures [for what purpose not given] from his partner, Jackson A. Lyon", who in turn had obtained them from representatives of the Bureau; that he knows of his own knowledge that representatives of the Bureau investigated the refund claim of petitioner on its merits (which is inconsistent with the pleadings, R. 66) and sent a formal rejection thereof to the petitioner on May 24, 1941; that he is president of both companies and knows the Government offered Niagara a refund of $51,000 in processing taxes subject to offsets of $41,000; that this offer included tax payments made by petitioner and, had petitioner's claim not been included, "no refund whatsoever would be due Niagara Falls Milling Company"; and that a letter (referred to in the Tax Court's opinion (R. 96)) was addressed to Harry Dickinson, Lockport, New York, requesting permission to examine the general ledgers and minute books of the Angelus and Middleport cor-

porations "for the years 1935 and 1936"[21] in connection with the claim for refund "under Title VII, Revenue Act of 1936—Claim F 5899", which was the claim filed by Niagara Falls Milling Company (R. 96, 126–128).

The affidavit of the partner, Jackson A. Lyon, a certified public accountant, merely states that he held conferences on September 4, 5, 6 and 7, 1940, with representatives of the Bureau of Internal Revenue who "investigated fully the merits of the claim of Angelus Milling Co., Inc., for its refund of processing taxes illegally collected". This is a pure conclusion unsupported by facts and is inconsistent with the pleadings (R. 66).

The fact that the Collector examined the joint books of the companies for the purpose of auditing the claim of Niagara Falls Milling Company does not establish that he obtained adequate data, or any at all, relating to petitioner's separate claim. To obtain such data as "cost", "gross sales value", and other information necessary to compute the petitioner's statutory margins and the presumed extent to which it bore the burden of the processing tax—if any was paid by it—would require an investigation of data relating to petitioner's separate operations which the record shows were not even kept. (R. 96.)

[21] Refund is claimed for taxes alleged to have been paid from July 9, 1933, through November, 1935. (R. 13, 16, 19, 21, 24–25, 32, 50–51, 52, 63–65, 110–111.)

It appears that the Niagara Company was unable prior to the due date to complete the compilation of the data necessary to support its claim (R. 27, Exhibit "B"), which indicates that something more than a simple examination of the books was required. One set of books was kept for the two companies and since separate accounts resulted only from arbitrary allocations (R. 96), it cannot be assumed that the Commissioner's agents would be able to determine the merits of petitioner's separate claim from a mere examination of the consolidated books. Since Niagara's claim was apparently based upon the total transactions of both companies, it was unnecessary to make such a separation in examining its claim.

The Tax Court gave full consideration to the matter and held that the letter of the Deputy Collector did not support the contention that the Commissioner gave consideration to the merits of the petitioner's claim and that the affidavits were not convincing that the Commissioner waived any defects in the claim, especially in the light of the petitioner's having pleaded (R. 8, 66) that the Commissioner had failed to give consideration to its claim (R. 96–97).

Petitioner having failed to establish the premise that all of the evidence necessary to support its claim was ascertained by the Commissioner independently of the claim itself, there is no basis for the contention that in that event he would be held to have waived the defects in the claim.

Petitioner's entire argument assumes, contrary to the fact, that the premise has been established.

Moreover, no waiver case goes to the extent of holding that a mere discovery of the facts by the Commissioner will constitute a waiver. In the cases relied on by petitioner the Commissioner had taken some definite action, which was communicated to the taxpayer, showing that he was considering the merits. Here he rejected the claim because of its incompleteness.

The purported waiver would necessarily have included a waiver of statutory provisions, because Section 903 of Title VII of the Revenue Act of 1936 requires that "All evidence relied upon in support of such claim shall be clearly set forth under oath". Therefore petitioner must establish that the Commissioner's power to waive extends to the requirements of the statute itself. Petitioner is in error in asserting (Br. 27) that the above excerpt from Section 903 is the same provision found in Treasury Regulations from 1916 to 1932 (Br. 60, Appendix E). The regulations during that period required that "All the facts relied on in support of the claim should be clearly set forth under oath". The difference between stating "all the facts" and "all evidence" relied upon in support of the claim; the contrast between the statutory "shall" and the word "should", used in the regulations; and the superior force attaching to statutory requirements as compared with those contained only in regula-

tions, are quite obvious. These distinctions have been pointed out and emphasized in *New York Handkerchief Mfg. Co.* v. *United States,* 142 F. 2d 111 (C. C. A. 7th), certiorari denied October 9, 1944; *18th Street Leader Stores* v. *United States,* 142 F. 2d 113 (C. C. A. 7th), certiorari denied October 9, 1944; *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313, 317 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232, 235 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. 2d 857, 859 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452, 454 (C. C. A. 6th); *Samara* v. *United States,* 129 F. 2d 594, 597 (C. C. A. 2d), certiorari denied, 317 U. S. 686; and *Cudahy Packing Co.* v. *United States,* 126 F. 2d 429 (C. C. A. 7th). All of these cases involved Title VII. The same distinction was made in *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 533.

There is no similarity here to the situation in *Tucker* v. *Alexander,* 275 U. S. 228. That case was fully explained in *United States* v. *Garbutt Oil Co., supra,* p. 534, and holds simply that a government official (counsel for the Government in that case) may waive the proper "form and contents" of a claim for refund, prior to the expiration of the period of limitation, when the only effect of an insistence upon a proper statement would have been "the resort of filing a new claim and pursuing it through the Bureau and

the courts" (302 U. S. 534). Here, on the other hand, the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to petitioner's claim.

The extent to which compliance with the statute and the Regulations is required as a condition precedent to suit against the Government is still further illustrated by later decisions of this Court. See *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. These decisions, and particularly the decision in *United States* v. *Garbutt Oil Co.*, emphasize that conditions precedent to suit, prescribed by statute, cannot be waived by the Commissioner but must be complied with strictly, and that when insisted upon by the Commissioner strict compliance with his regulations is a necessary prerequisite to the maintenance of an action against the Government for the recovery of taxes illegally collected. See also *Weagant* v. *Bowers*, 57 F. 2d 679 (C. C. A. 2d); *Snead* v. *Elmore*, 59 F. 2d 312 (C. C. A. 5th); *Taber* v. *United States*, 59 F. 2d 568 (C. C. A. 8th), certiorari denied, 287 U. S. 636; *Dascomb* v. *McCuen*, 73 F. 2d 417 (C. C. A. 2d).

The cases relied upon (Br. 20, 37) by petitioner are distinguishable from the present one, in that

the Commissioner in each instance took action with respect to the merits, without objection going to the sufficiency of the claim. In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the Commissioner admittedly had investigated and audited the taxpayer's books and records, examined the claim for refund on the merits, and notified the taxpayer of an overpayment of taxes which would be the subject of a certificate of overassessment; and a properly-amended claim had been filed before rejection. This Court expressly reserved the question whether the Commissioner's action in investigating the claim on the merits and reporting to the taxpayer the result of his inquiry was a waiver which would call for the return of overpayments though no amendment had been offered.

In the instant case there was not a determination on the merits; the claim was rejected; and no curative amended claim was offered.

IV

THE TAX COURT WAS WITHOUT JURISDICTION FOR THE FURTHER REASON THAT IT IS NOT SHOWN THAT THE PETITIONER PAID ANY AMOUNT TO THE GOVERNMENT AS TAX UNDER THE AGRICULTURAL ADJUSTMENT ACT

One of the reasons given by the Commissioner for his disallowance of the petitioner's claim, as found by the Tax Court, was that the petitioner had not paid to the Government the amount of tax for which the claim was made. This would be

true even if the data lacking in petitioner's claim were supplied from Niagara's. (R. 40–41.) The point was renewed in the Commissioner's motion to dismiss (R. 74).

The Tax Court found it unneeessary to discuss the point, but noted that the claims state that the tax was paid by Niagara. (R. 97.) However, it is clear that the Tax Court has no jurisdiction to entertain a suit based upon a claim filed by one who did not pay to the Government as a tax the amount sued for. Therefore the Tax Court's holding that there was no legal basis presented under which the petitioner was entitled to the refund of any amount of processing taxes paid under the Agricultural Adjustment Act is supportable on this independent ground.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1945.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect

to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903. [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].

FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Ad-

justment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed, is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during

such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for com-

modities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similiarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him

and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them:

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or col-

lected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC. 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942, shall be deemed pending in and be transferred forthwith to the Board of Tax Ap-

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

peals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

* * * * *

(7 U. S. C. Supp. III, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incum-

bent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 601. *Claim form prescribed.*—Claims for refunds of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data

with respect to the amount of processing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for

the period before and after the tax. (For definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity

processed" shall be the cost of the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

U. S. GOVERNMENT PRINTING OFFICE: 1945